

**NATIONAL ASSEMBLY OF PARLIAMENT OF SOUTH
AFRICA**

PORTFOLIO COMMITTEE ON HEALTH

WRITTEN SUBMISSION

**(TO BE PRESENTED AS AN ORAL SUBMISSION ON
NOVEMBER 13 2007 WITH THE LEAVE OF THE COMMITTEE)**

BY

JUSTICE ALLIANCE OF SOUTH AFRICA

**CHOICE ON TERMINATION OF PREGNANCY AMENDMENT
BILL 2007**

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CTOP AMENDMENT BILL 2007

Submission in general

Our submission is that the scope of the 1996 Act should not be enlarged in terms of more facilities and more staff unless the widespread abuses and problems of the present legislation are addressed at the same time.

Breaches of the Constitution by the NCOP

1. In the Doctors for Life case the Constitutional Court made it clear that in an Amendment Bill the public were free to make suggestions as to any matter relating to the subject of the Amendment Bill; in other words they were not to be confined to submissions concerning the clauses as originally drafted in the Bill. For instance, at paragraph 171 the Court said:

The requirement that participation must be facilitated where it is most meaningful has both symbolic and practical objectives: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the *legislators must have the benefit of all inputs that will enable them to produce the best possible laws.*

2. JASA very much regrets that the Social Services Select Committee of the NCOP refused to consider the proposals in the

preliminary mandates, and some in final mandates, for further amendments to the Bill.

3. Furthermore JASA much regrets that no public hearings by the NCOP were held in breach of section 72(1)(a) of the Constitution.

4. JASA submits that in view of those constitutional breaches by the NCOP, it is essential for the National Assembly to take great care to give the public a “meaningful” opportunity to be heard on all the issues rejected by the NCOP, and to ensure that each issue is given the consideration it deserves bearing in mind the recommendations of the Provinces.

Alternatively, the Bill should be sent back to the NCOP with a request that they:

- Give proper consideration to all the issues raised by the Provinces.
- Hold public hearings pursuant to their duty under section 72 of the Constitution.

New Clauses needed in the Bill (these clauses are ready for insertion in the Bill having been drafted by Senior Counsel with Parliamentary experience)

1. Counselling

Before a medical practitioner, or registered midwife or nurse, performs an abortion he or she shall ensure that the woman is counselled in a manner which provides a full opportunity for discussion and questions, and such counselling shall in every case include:

- (a) Sufficient information, imparted either by electronic pictures or coloured diagrams and photographs, to enable the woman to understand the existing stage of development of the unborn child in her womb.
- (b) A discussion of the extent of the risks involved in continuing the pregnancy, as set against the risks involved in having an abortion. The latter must be explained in the light of the latest medical science available at the time, and must include explanation of the following risks:
 - (i) The increased risk of breast cancer following an abortion.
 - (ii) The risk of depression and associated symptoms after a period of years.
 - (iii) The risk of difficulties in conceiving, and bearing children in the future.

(c) The available alternatives to abortion, and in particular the ways in which the State and other agencies will support the mother and child, particularly in the event of the child being born disabled.

2. Informed Consent – Substitution of section 5 of the Principal Act

The following section is hereby substituted for section 5 of the Principal Act:

(1) Save as provided for by subsections 2 and 3 of this section, the informed consent of the woman shall be required in every case before a termination of pregnancy is performed and shall in every case consist of the three ingredients of knowledge, appreciation and consent:

- (i) Knowledge means that the woman must be fully informed, in a manner appropriate to her standard of education, of the nature and extent of the risks involved.
- (ii) Appreciation means that she must not merely receive the information but understand it as applicable to her particular situation.
- (iii) Consent means that she must subjectively consent to each step in the procedure and all its consequences.

(2) In the case of a pregnant minor a termination of pregnancy shall only be performed by a medical practitioner who shall counsel her in accordance with section (aforesaid section) of this Act, and thereafter proceed as follows:

- (i) If, following the counselling procedure, the medical practitioner is satisfied that the minor is able to give her informed consent, and she still wishes to proceed with the termination, he shall then direct her to consult with one or both of her parents or guardians, and advise her to consult with any other person she may have confidence in, and then, if she wishes to proceed, to return after a minimum of 7 days with the written consent of at least one parent or guardian. If appropriate, he must explain that a judge can be asked to give consent in accordance with section 5 of this Act if it is not possible to obtain the consent of one parent or guardian.
- (ii) If, following the counselling procedure, the medical practitioner is not satisfied that the minor is able to give her informed consent, and he is still of the opinion, after further consultation with a second medical practitioner, that a termination of the pregnancy is in her best interests, he shall contact the parents or guardians and repeat the counselling procedure as set out in section () (*as above*) of this Act with the minor and in the presence of at least one parent or guardian. The medical practitioner may then proceed with the termination provided he is satisfied he has the consent of the minor and the informed consent of at least one parent or guardian, or a judge.

(3) Only a medical practitioner may perform a termination of pregnancy on a woman who appears to be disabled mentally or who appears to be unconscious. In the case of a mentally disabled woman who in the opinion of the medical practitioner is not capable of giving her informed consent, or in the case of a woman who has suffered a continuous state of unconsciousness for a period of at least 14 days and in the view of at least two medical practitioners is unlikely to recover consciousness in the foreseeable future, the pregnancy may be terminated without the informed consent of the woman, provided the informed consent of her natural guardian, spouse or legal guardian (or, if such persons cannot be found her curator personae) is obtained.

3. Judicial By-Pass

In order to provide for the situations envisaged in section () (*the above para*) of this Act, where the consent of a parent or guardian is not available, the Minister shall make Regulations enabling a minor or medical practitioner to apply to a Judge of the High Court in chambers with expedition, without employing a legal representative, and without court fees.

Why are these clauses necessary?

A. Section 4 of the 1996 Act provides that 'The State shall promote the provision of non-mandatory and non-directive counselling before and after the termination of a pregnancy.'

The difficulty caused by this section is that practitioners take the view that the onus is on the State, not on them; ‘non mandatory’ is taken to mean there is no duty on them, whereas Parliament almost certainly intended it to mean that a woman cannot be forced to listen to counselling; and ‘non directive’ opens the door even wider for the practitioner to assume that if a woman asks for an abortion any mention of the risks involved might be construed as ‘directive.’ The drafting of the section is uncertain and equivocal. By contrast, the regulations relating to counselling of persons receiving HIV testing are extensive, specific and unambiguous.¹

It is true that the regulations made under the 1996 Act are more specific as to the content of the counselling but they add nothing as to who must do the counselling. Regulation 7 requires that counselling should include:

- (i) The available alternatives to TOP (ie adoption, keeping the child etc)*
- (ii) The procedure and associated risks of the TOP (it is submitted this must require the use of graphic material for most women, and must have regard to the current state of medical knowledge which today recognizes at least 3 areas of risk – increased prevalence of breast cancer, the 5-7 year depression syndrome, and difficulties relating to pregnancies in the future.*
- (iii) Contraceptive measures for the future.*

Not only is it vital that legislation should specify who is responsible for ensuring that counselling is done, but furthermore, there can be little doubt that any abortion performed without such counselling will be illegal in the civil courts and give rise to an action for damages because, without counselling, informed consent required by section 5 cannot be obtained.

B. Mandatory Informed Consent required by section 5 of the 1996 Act.

¹ See Minister of Health’s Directive in terms of section 2 of the National Policy for Health Act 116 of 1990 which defines ‘informed consent’, ‘pre-test counselling’ and post-test-counselling.’ Six different matters are specified as mandatory topics for pre-test counselling discussions.

This requirement of the law was reiterated and explained in detail by Judge Mojapelo in what is known as the second Christian Lawyers Association challenge to the legislation.²

The judgment contains this passage:

The courts have often endorsed the following statements by Innes, CJ in Waring & Gütow v Sherborne 1904 TS 340 at 144 to found a defence of consent:

"It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent"

The requirement of "knowledge" means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risk". See Castell v De Greef (supra) at 425. Neethling Potgieter & Visser (op cit) at 100-101 and Neethling (op cit) at 121-122.

The requirement of "appreciation" implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk," See Castell v De Greef (supra) at 425; Neethling Potgieter & Visser (op cit) at 101 and Neethling (op cit) at 122.

The last requirement of "consent" means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its sequences". Castell v De Greef (supra), at 425, Neethling Potgieter & Visser, (op cit) at 120 and Neethling (op cit) at 122.

It is surely a matter of common sense that no nurse, midwife or doctor can possibly be sure of these matters without taking twenty minutes at least to explain the state of the unborn child in the woman's womb, the procedure he is offering, the risks involved, and the alternatives open to her; he must then be prepared to answer her questions however

² Christian Lawyers Association vs Minister of Health (no 2) 2005 1 SA 509

long it takes. An exception perhaps would be a gynaecologist who wanted an abortion – in such a case it might be reasonable to assume ‘informed consent’.

We believe therefore that it has been proved necessary to set out in the Act itself, not merely in Regulations often not known to practitioners, both what is required and of whom it is required.

4. Conscientious Objection

Save in a situation where it is necessary to act immediately to save life, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorized by the Principal Act or the Amendment Act (including any treatment relating to surgical evacuation of the womb which may follow medical treatment) to which he or she has a conscientious objection on the ground of religion, conscience or belief.: Provided that the burden of proof of conscientious objection shall rest on the person seeking to rely on it.

This clause is necessary because so many thousands of health workers find themselves under pressure to perform abortions contrary to their consciences and religious beliefs. 10 years of history has proved that the Constitution does not provide sufficient protection for such persons without an express clause in the CTOP legislation.

On June 22 2007 the Labour Court of Appeal (3 judges) handed down a judgement which stressed the need for the Minister to provide certainty in this area of the law. (Charles and others vs Gauteng Health Department and others).

NB. The above clause is based upon the conscientious objection clause contained in the Abortion Act, 1967 in the UK which has worked without problems for 30 years.

5. Keeping of Records

Amendment of section 7(1) of the Principal Act

Section 7(1) of the Choice on Termination of Pregnancy Act, 1996 is hereby amended by the addition of “ or (c)” after “(b)” in line three.

This clause is necessary because the present law does not require any records to be kept of third trimester abortions.

6. Offences and Penalties – Substitution of section 10(1) of the Principal Act

The following section is hereby substituted for section 10(1) of the Principal Act.:

(1) Any person who terminates a pregnancy otherwise than in accordance with the Principal Act, the Amendment Act and this Act, or at a facility not approved in terms of the Acts, or without ensuring that the requirements of the Acts relating to counselling and informed consent have been complied with, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

(2) Any person who willfully with physical force prevents a woman attending a facility approved for terminations of pregnancy, or in any physical manner willfully prevents the lawful termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 2 years.

Why is this clause necessary?

Sub-clause (1) makes it a criminal offence for any person, including a doctor, to carry out an illegal abortion. Currently there is no prohibition against a medical practitioner who carries out an abortion contrary to section 2(1)(a). It also gives teeth to the requirements relating to counselling and informed consent.

Sub-clause (2) clarifies the current provision which some try to construe as applicable to health workers who decline to do an abortion on the ground of conscientious objection. The intention of Parliament was to penalize demonstrators who blockade clinics and other forcible behaviour, not those who have conscientious objection.

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8th November 2007